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June 26, 2000

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By Messenger

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street S.W.
Washington, D.C. 20554

Re: **Ex Parte**
VoiceStream Comments, WT Docket 97-82

Dear Ms. Salas:

On June 22, 2000, VoiceStream Wireless Corporation ("VoiceStream") timely filed Comments pursuant to the Commission's Further Notice of Proposed Rulemaking released on June 7, 2000 in the above-captioned proceeding. The Comments, however, did not contain a summary or table of contents. Enclosed is a corrected copy of VoiceStream's Comments that includes a summary and table of contents. The corrected copy contains no other changes.

If you have any questions, please contact the undersigned.

Very truly yours,

/s/ Brian O'Connor
Brian O'Connor

cc: Audrey Bashkin

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's)	WT Docket No. 97-82
Rules Regarding Installment Payment)	
Financing for Personal Communications)	
Services Licensees)	

COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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Dated: June 22, 2000

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Pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Federal Communications Commission ("FCC" or "Commission") on June 7, 2000 in the above-captioned proceeding,¹ VoiceStream Wireless Corporation ("VoiceStream") submits these Comments. VoiceStream applauds the Commission's decision to review the C and F Block rules in the context of a rulemaking proceeding. The potential impact of revisions to the rules on the overall structure of the PCS industry requires the careful consideration of public policy concerns and the long term objectives for the industry as a whole that this proceeding will produce.

The financial hurdles that designated entities have faced with respect to construction and operation of PCS systems are well documented. Since the Commission instituted entrepreneurs' block PCS auctions, only a small percentage of C and F Block licensees have begun providing service. Increasingly customers demand regional and

¹ See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Further Notice of Proposed Rulemaking, WT Docket No. 97-82, FCC 00-197 (June 7, 2000).

nationwide service and “one rate” plans² that can only be provided by carriers with large coverage areas. The existing C and F Block rules, coupled with the CMRS spectrum cap, make it difficult, expensive and organizationally limiting to finance construction and operation of PCS networks with wide coverage areas. Accordingly, VoiceStream urges the Commission to revise the C and F Block rules to permit “open” bidding at future auctions and the unrestricted transfer and assignment of C and F Block licenses. Additionally, VoiceStream asks that the Commission accelerate review of the CMRS spectrum cap as part of its biennial review as opposed to the instant proceeding. In light of the potential impact of such a parallel proceeding and the importance of Auction 35 to the completion of carriers’ national footprints, the Commission should afford bidders in Auction 35 flexibility as to the date of their spectrum cap compliance.³

I. SUMMARY

Specifically, VoiceStream respectfully requests that the Commission: (1) open future C and F Block auctions to all bidders regardless of entrepreneur status, or in the alternative, establish one million POPs as the threshold for BTA tiers; (2) eliminate eligibility requirements for the auction of 15 MHz C Block and 10 MHz F Block licenses; (3) eliminate designated entity transfer restrictions, or in the alternative, permit transferability based upon a combined-market substantial service requirement; (4) retain the existing small and very small business bidding credits; (5) lift the license cap; and (6) lift the spectrum cap as part of the Commission’s biennial review. Adopting these modifications to the C and F Block rules will achieve the appropriate balance between the

² AT&T’s single rate plan attracted a million new customers in 1999. *See* AT&T Corp., SEC Form S-3, Amendment 1, at 39 (filed Mar. 28, 2000).

interests of designated entities and larger providers while advancing competition and the provision of service to consumers in the PCS industry.

II. VOICESTREAM HAS A STRONG INTEREST IN THIS PROCEEDING

VoiceStream is a leading provider of wireless communications services throughout the United States. It provides personal communications services using the Global System for Mobile Communications (“GSM”) technology and is a member of the North American GSM Alliance LLC. That Alliance is composed of U.S. and Canadian digital wireless PCS carriers that work together to provide roaming for their domestic GSM customers in more than 3,500 U.S. and Canadian cities and towns, and also offer service to international roamers. Following its recently completed mergers with Omnipoint Corporation (“Omnipoint”)⁴ and Aerial Communications, Inc. (“Aerial”),⁵ VoiceStream is among the top five providers of wireless communications services in the United States. Nearly 220 million Americans reside in areas licensed to be served by VoiceStream or companies in which VoiceStream holds non-controlling interests.⁶

Participation in Auction No. 35 is critical to VoiceStream’s ability to provide seamless GSM service to customers throughout the United States. Even after merging with Omnipoint and Aerial, VoiceStream has certain major market gaps in its national footprint. The licenses to be auctioned in Auction No. 35 could fill these essential gaps and enable VoiceStream to compete more effectively with its well-established rivals,

³ See *Applications of Aerial Communications, Inc. and VoiceStream Wireless Holding Corp.*, DA 00-730 (Mar. 31, 2000) (“Aerial/VoiceStream Order”) at ¶¶ 33-38.

⁴ On February 15, 2000, the Commission approved the VoiceStream/Omnipoint merger. See *Applications of VoiceStream Wireless Corp. and Omnipoint Corp.*, WT Docket No. 00-3, FCC 00-53 (Feb. 15, 2000). The merger was consummated on February 25, 2000.

⁵ On March 31, 2000, the Commission approved the VoiceStream/Aerial merger. See *Aerial/VoiceStream Order*. The merger was consummated on May 4, 2000.

which include AT&T Wireless, Verizon Wireless, Sprint PCS, Nextel Communications, and soon the SBC/BellSouth wireless joint venture.⁷ As it has in every broadband PCS auction to date, VoiceStream intends to be a major participant in Auction 35. Thus, VoiceStream has a significant interest in the outcome of this rulemaking proceeding.

III. FUTURE AUCTIONS SHOULD BE AS OPEN AS POSSIBLE TO BIDDERS REGARDLESS OF ENTREPRENEUR STATUS

A. The Reconfigured C Block Licenses And All Other C And F Block Licenses Should Be Subject to Open Bidding to the Greatest Extent Possible

VoiceStream agrees with the Commission's proposal to reconfigure each 30 MHz C Block license available at Auction No. 35 into three 10 MHz licenses. As the Commission recognizes, this new configuration should make licenses more affordable for smaller bidders while providing greater flexibility to larger bidders. To further promote such flexibility in bidding, the Commission should permit bidders to aggregate the 10 MHz C Block licenses.⁸

VoiceStream urges the Commission to eliminate eligibility restrictions for all reconfigured 10 MHz C Block licenses (and remaining C and F Block licenses as well). Opening Auction No. 35 and future auctions to all bidders would spur competition by allowing providers to acquire additional spectrum to fill in regional or national footprints, meet spectrum capacity concerns in specific markets, and provide advanced and innovative services. This solution would speed PCS service to the public as providers

⁶ See *FCC OKs VoiceStream, Omnipoint Deal*, Associated Press, Feb. 15, 2000.

⁷ See *SBC Communications, Inc. and BellSouth Corporation Seek FCC Consent to Transfer Control of, or Assign, Licenses to Joint Venture*, FCC Public Notice, WT Docket No. 00-81, DA 00-1120 (May 19, 2000).

with the resources and expertise to construct and operate PCS systems would be given the opportunity to acquire the spectrum they need. This need is greatest in larger markets, where setting aside spectrum for designated entities in the previous auctions has resulted in limited provision of service by entrepreneurs.

B. In the Alternative, the Commission Should Establish One Million POPs As the Proper Threshold for BTA Tiers

If the Commission decides to implement its proposal to eliminate eligibility restrictions only for two of the three 10 MHz C Block licenses in Tier 1 and one of the three 10 MHz C Block licenses in Tier 2, VoiceStream encourages the Commission to use a population of one million as the threshold to divide the Tier 1 and Tier 2 BTAs. As the only national GSM carrier, VoiceStream, in particular, requires the lower threshold to fill in its national footprint adequately. In the Voicestream/Aerial Order, the Commission found that creation of a national GSM footprint substantially benefits consumers and is procompetitive.⁹ Moreover, the Commission's record correctly indicates that designated entity successes have occurred in smaller markets and that markets with larger populations inevitably need more capital to build out and provide service. Accordingly, a population figure of one million is a sensible threshold.¹⁰

⁸ As explained below, VoiceStream also believes that sufficient time has lapsed for the Commission to take one step further in this respect and lift the spectrum cap. This, however, should be done in a separate proceeding where cap issues may be assessed comprehensively.

⁹ VoiceStream/Aerial Order at ¶¶ 43-44.

¹⁰ Other commenters have proposed similar figures. See AT&T Opposition at 5-7 (approximately one million); SBC *Ex Parte* (March 21, 2000) (700,000).

IV. THE COMMISSION SHOULD ELIMINATE ELIGIBILITY REQUIREMENTS FOR 15 MHZ C BLOCK AND 10 MHZ F BLOCK LICENSES

As the Commission noted in the FNPRM, build out of F Block spectrum licenses has not progressed very quickly, especially in larger markets. Allowing “open” bidding on (and thus allowing larger carriers to acquire) the F Block licenses available in Auction No. 35 and thereafter likely will lead to more expeditious build out of F Block spectrum and provision of service to consumers.

Likewise, eligibility requirements should be eliminated with respect to 15 MHz C Block licenses in Auction No. 35 and in the future. All of the 15 MHz C Block licenses available in Auction No. 35 were available in restricted Auction No. 22, yet remained unsold. Making these licenses available to all bidders will expedite their sale and buildout.

V. DESIGNATED ENTITY TRANSFER RESTRICTIONS SHOULD BE ELIMINATED

The Commission is correct to conclude that it should modify its transfer requirements to correspond to changes in the eligibility requirements and to encourage rapid construction of C and F Block systems.¹¹ VoiceStream supports the Commission’s tentative conclusion that C and F Block licenses won at Auction No. 35 or any future open auction for such spectrum, should not be subject to a transfer holding rule. VoiceStream disagrees, however, with the Commission’s proposal that licenses won in closed bidding at a past or future auction should be tied to completion of build-out requirements.

¹¹ FNPRM at ¶ 44.

A. The Commission Should Eliminate Transfer Restrictions on C and F Block PCS Licenses To Encourage The Development Of Rational Ownership Structures and Seamless Regional and Nationwide Systems

Whether or not the Commission decides to eliminate or modify the designated entity (“DE”) eligibility restrictions for upcoming auctions, it should eliminate the restrictions set forth in Section 24.839 of the Commission’s rules on transfers of control or assignments of C and F block licenses.¹² Those restrictions have created the opportunity Congress intended for small businesses to participate in PCS.¹³ Much like the old wireline fence in cellular designed to create an **application** opportunity for new non-wireline competitors, restricted spectrum blocks were never intended to create a permanent class of competitor artificially preserved without regard to marketplace realities. The DE restrictions on sale have served their purpose and even if the Commission ultimately elects to have closed bidding on portions of the C and F Block spectrum, it should nonetheless allow those auction winners the independence to deploy that spectrum in a manner that achieves its best and highest use.¹⁴ Moreover, allowing non-DEs to acquire C and F Block licenses in Auction No. 35 while prohibiting the transfer of existing C and F Block licenses to non-DEs would violate the Commission’s obligation to ensure symmetrical regulatory treatment of similarly situated service

¹² 47 C.F.R. § 24.839.

¹³ To meet the Congressional goals of promoting economic opportunity and competition by dissemination of licenses among a wide variety of providers, the Commission designed the designated entity rules to mitigate the imbalance between the relative abilities of small and large businesses to access capital. The rules accomplished this goal by establishing set-aside (the C and F) Blocks of spectrum, in which large companies would be prohibited from bidding or holding licenses for a period of time. FNPRM at ¶ 7.

¹⁴ See *Fresno Mobile Radio v. FCC*, 165 F.3d 965, 969 (D.C. Cir. 1999) (the amount of money paid for a spectrum license is not relevant to the buyer’s natural incentive to find the best and highest use of the asset).

providers¹⁵ -- an obligation that should apply with even greater force among providers of the same PCS service.

For this reason, VoiceStream urges the Commission to lift its buildout requirements with respect to the transfer and assignment of C and F Block licenses. At present, the PCS industry is at a crossroads similar to that faced by the cellular industry in 1987. There, as here, unwieldy ownership structures,¹⁶ high roaming costs and the need to establish efficient regional and national networks all weigh in favor of allowing consolidation. In cellular, the Commission permitted the transfer of unbuilt licenses to hasten the development of viable national and regional cellular competitors. The Commission should aspire to the same goals here.

In 1987, the Commission found that the inability of cellular permittees to transfer their permits for unconstructed facilities at a profit was frustrating its overriding goal of

¹⁵ See *Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101*, Memorandum Opinion and Order and Notice of Proposed Rule Making, FCC 00-33, 2000 FCC LEXIS 642, at ¶ 2 (Feb. 14, 2000) (stating that new consolidated Part 101 furthers regulatory parity among fixed wireless services); see also *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, 12 FCC Rcd 9962, 9966 (1997) (holding that to allow “certain providers to achieve operating and spectrum efficiencies and competitive benefits while leaving regulatory obstacles for other CMRS providers conflicts with our ongoing goal to provide regulatory parity for commercial mobile services as mandated by Congress” at 47 U.S.C. § 332(c)(2)); *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 2863, 2864 (1994) (in devising a regulatory structure to implement 47 U.S.C. § 332, the Commission intended to ensure symmetrical regulatory treatment of competing mobile service providers, to promote competition and economic growth in the mobile services marketplace, and to establish an appropriate level of regulation to protect consumers).

¹⁶ In cellular, fragmented inefficient ownership structures resulted from settlements encouraged by the Commission to avoid lotteries and ensuing litigation. In PCS, inefficient structures are often the result of constraints imposed by the Commission’s C and F Block rules. As a result of the inherent tension in those rules between the Commission’s worthy objectives and normal marketplace realities, substantial equity, expertise and financial resources often repose outside of the licensee’s control group. This has created barriers in financial markets inhibiting rapid deployment and growth of C and F Block PCS systems.

the rapid and efficient provision of cellular service to the public.¹⁷ Cellular permittees, especially in smaller MSAs, were faced with competition from wireline carriers that were already operating in a wide area, *i.e.*, a multi-MSA-cellular system.¹⁸ The smaller permittees found that it was not economically feasible to operate the system they originally intended to construct as a “stand alone” system and thus sought to sell their unbuilt construction permits.¹⁹ If forced to build a system under those circumstances, the smaller permittees would have a strong incentive to construct merely minimally acceptable facilities solely for the purpose of completing a sale.²⁰ The Commission found that requiring such a buildout was not in the public interest because it would result in the buyer of the permit incurring potentially significant costs to integrate incompatible systems at a later time.²¹ Allowing such sales thus would reduce costs to the public, allowing carriers to serve their customers more efficiently, which in turn would enhance their ability to compete.²²

The same conditions exist today in the PCS industry. DEs, confronted with changed economic conditions and competition from larger carriers already operating in multiple BTAs, have encountered significant obstacles to financing the buildout of the PCS licenses they won at auction.²³ Finding that it is not economically feasible to

¹⁷ See *Madison Cellular Telephone Company*, 2 FCC Rcd 5397, at ¶ 4 (1987) (“Madison Cellular”).

¹⁸ *Id.*

¹⁹ *Id.* See also *Bill Welch*, 3 FCC Rcd 6502, at ¶ 23 (1988).

²⁰ *Madison Cellular* at ¶ 5.

²¹ *Id.*

²² *Bill Welch* at ¶ 19.

²³ See FNPRM at ¶ 10 (regarding C Block licensee bankruptcies), ¶ 20, note 69 (regarding small percentage of licensees that have begun providing service).

operate the system they originally intended to construct on a “stand alone” basis, DEs are seeking to sell their unbuilt licenses. If the Commission forces DEs to build a system under these circumstances, the Commission will be providing an incentive for the construction of minimally acceptable facilities built for the purpose of completing a sale. As in the cellular context, requiring such a buildout is not in the public interest. VoiceStream urges the Commission instead to lift its buildout requirements with respect to the transfer and assignment of C and F Block licenses and refrain from imposing unjust enrichment penalties on transfers of existing DE licenses. Lifting the restrictions will spur the development of viable national and regional cellular competitors. Leaving the restrictions in place will serve only to frustrate competition and penalize DEs who may have misjudged the way the marketplace actually developed.

Because they are similar in purpose, the Commission should treat DE eligibility requirements like the non-wireline set aside rules it lifted in the mid-1980s. The Commission had adopted a wireline/non-wireline frequency allocation in the cellular industry to expedite the introduction of cellular service in a way that would effectively utilize the technical expertise of wireline carriers and would give both wireline and non-wireline carriers an opportunity to enter the cellular industry.²⁴ The Commission designed the set-aside to be a temporary measure related to the application process scheduled to sunset as the period for filing initial applications expired so that the anticompetitive effects of the set-aside would be minimized.²⁵ When the Commission granted authorizations to both wireline and non-wireline carriers, the opportunity for

²⁴ *James F. Rill, Trustee for Comet Inc., and Pacific Telesis Group*, 60 RR 2d 583 (1986), at ¶ 27.

²⁵ *Id.* at ¶¶ 27 and 29 (citing *Advanced Mobile Phone Service, Inc.*, 93 FCC 2d 683 (1983)).

those carriers to become involved in providing cellular service had been realized. After that point, the Commission permitted non-wireline carriers to transfer their interests to wireline carriers if they so chose.²⁶

Again, the precedent from the cellular industry is instructive for PCS. Like the wireline set-aside, the eligibility restrictions of the C and F Block auction rules were designed by the FCC to expedite the provision of PCS service and to provide smaller businesses with an opportunity to participate in the industry. Similarly, the eligibility restrictions should be a temporary measure in order to minimize their unintended harmful effects. Many DEs have been granted authorizations to construct PCS facilities by the Commission. As the Commission recognized in the FNPRM, the PCS auctions have resulted in substantial diversity among C and F Block licensees.²⁷ As such, the goal of providing the opportunity for small businesses to become involved in the PCS industry has been realized. At this point, the Commission should permit broader competition for PCS licenses, including through transfers by incumbent licensees, especially in light of the trend towards regional and nationwide provision of service.

B. In the Alternative, the Commission Should Permit Transferability Based Upon a Combined-Market Substantial Service Requirement

If the Commission is unwilling to permit unfettered transferability of C and F Block licenses, VoiceStream urges the Commission to allow some flexibility for incumbent C and F Block licensees that may not have fully satisfied the construction requirements for all of their licenses. Such licensees may have encountered unforeseen financial and operational difficulties with construction and thus need the flexibility to sell

²⁶ *Id.* at ¶ 30.

²⁷ FNPRM at ¶ 47.

and exchange licenses in order to restructure their business plans. Conversely, they may have achieved a sufficient degree of success as to be attractive to non-DE merger candidates. In either event, DEs should not be artificially deprived of the market opportunities enjoyed by non-DEs. Particularly during the ongoing wave of consolidation, DEs should not be shackled as market opportunities pass them by. The Commission can provide the flexibility needed by allowing incumbent licensees to assign or transfer licenses to any entity upon a demonstration of “substantial service.”

In VoiceStream’s view, an appropriate standard for “substantial service” is service to 25 percent or more of a DE’s combined POPs, rather than on a market-specific basis. The 25 percent threshold accords with substantial service benchmarks established in other Wireless Radio Services.²⁸ Over the course of the Commission’s C and F Block regime, DEs may have participated in auctions or otherwise purchased spectrum through distinct applicant entities.²⁹ Accordingly, for purposes of this standard, the Commission should treat all licenses ultimately held by the same controlling entity on a combined basis to capture all DE licensees that are actually controlled by the same party. Only then will the regional service provided by a DE be appropriately measured.

VI. THE COMMISSION SHOULD RETAIN THE EXISTING SMALL AND VERY SMALL BUSINESS BIDDING CREDITS

VoiceStream urges the Commission to retain the existing small and very small business bidding credits of 15 percent and 25 percent, respectively, and to apply those

²⁸ In its order on the Wireless Communications Services (“WCS”), the Commission stated that a safe harbor for a WCS licensee offering mobile services would be a demonstration of coverage to 20 percent of the population of its licensed service area. *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Services (“WCS”)*, Report and Order, 12 FCC Rcd 10785, 10844 (1997).

²⁹ VoiceStream, for example, is a non-controlling, non-attributable 49 percent owner of four distinct entities controlled by Cook Inlet Region, Inc.

same credits in all auctions of C and F Block licenses, whether subject to open or closed bidding. These bidding credits have enabled small businesses to compete effectively in previous Commission auctions of PCS as well as other types of licenses and thus should remain in effect as currently devised.

VII. THE LICENSE CAP SHOULD BE LIFTED

VoiceStream agrees with the Commission's tentative conclusion that the time is now right to remove the license cap of Section 24.710 from its rules. As the Commission recognizes, the 98-license limit was established at a time when the Commission foresaw holding only one auction and 98 represented approximately 10 percent of the total C and F Block licenses available. Furthermore, the Commission has achieved the substantial diversity among C and F Block licensees that served as the objective of the license cap rule. As prior payment options and the Commission's current proposal to reconfigure spectrum have and will continue to increase the number of licenses available for auction, the license cap is no longer necessary for or suited to its purpose.

VIII. THE SPECTRUM CAP SHOULD BE LIFTED AS PART OF THE BIENNIAL REVIEW

The rigid structural barrier created by the 45/55 MHz CMRS spectrum cap³⁰ is detrimental to burgeoning competition in the wireless marketplace. Relief, however, should occur as part of the Commission's biennial review, not on a piecemeal basis solely for Auction 35. Given the importance of this auction to carriers' ability to complete their regional or national footprints, the Commission should both accelerate its biennial review

³⁰ See 1998 Biennial Regulatory Review--*Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, WT Docket No. 98-205, FCC 99-244 (Sept. 22, 1999) at ¶¶ 77-85.

and accord bidders increased flexibility as to the time in which they must demonstrate compliance with the spectrum cap.

IX. CONCLUSION

For the reasons set forth above, VoiceStream respectfully requests that the Commission: (1) open future C and F Block auctions to all bidders regardless of entrepreneur status, or in the alternative, establish one million POPs as the threshold for BTA tiers; (2) eliminate eligibility requirements for the auction of 15 MHz C Block and 10 MHz F Block licenses; (3) eliminate designated entity transfer restrictions, or in the alternative, permit transferability based upon a combined-market substantial service requirement; (4) retain the existing small and very small business bidding credits; (5) lift the license cap; and (6) lift the spectrum cap as part of the Commission's biennial review. By these actions, the Commission will strike the proper balance between the interests of designated entities and larger providers in a way that promotes competition in the PCS industry and will speed advanced, nationwide PCS service to consumers.

Respectfully submitted,

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